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IN THE

UNITED STATES SUPREME COURT

JAMES C. WORTH,

Petitioner and Defendant

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT (RE UNITED STATES VS. WORTH, CASE NO. 21,107)

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49014

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Now comes JAMES C. WORTH, Petitioner and Appellant herein, by counsel named below, and submits the following as his petition for writ of certiorari praying that this Court shall review the decision of the United States Court of Appeals for the Sixth Circuit described below, and upon acceptance for review, reverse the decision of said Court and remand the same to the District Court of the United States for the Eastern District of Michigan, Southern Division, for new trial.

I

OPINIONS OF LOWER COURT

This cause originates in an indictment of Petitioner returned by the Grand Jury sitting in the City of Detroit, in the Eastern District of Michigan. Trial was held resulting in judgment of conviction entered in said Court on jury verdict on July 17, 1970, with Hon. Lawrence Gubow, United States District Judge presiding. No official or unofficial opinion was delivered by the District Judge. Claim of appeal was taken and opinion filed, which has not as yet

been officially published. A true copy of such opinion is appended hereto.

II

STATEMENT OF GROUNDS OF JURISDICTION

Petitioner claims the right to apply for discretionary review of the opinion of the Court of Appeals by writ of certiorari, on the basis that the judgment of the Court of Appeals is in error, and timely application is hereby made, said judgment having been entered on the 8th day of June, 1971. That this cause is an adjudication of guilt and conviction of the terms of U.S.C. Title 18, §495 and 2(A), the text of which is set forth below, and Petitioner is entitled to apply for relief under the terms of 28 U.S.C. §1254.

Petitioner contends that the decision of the lower court is in conflict with United States v. Tucker, 267 F. 2d 212 (U.S.C.A. 3d, 1959) and the rule as to the obligation of the prosecuting authority recognized in Namet v. United States, 373 U.S. 179, 10 L. Ed. 2d 278, 83 S. Ct. 1151 (1963). Petitioner further contends that the

actions of the prosecuting authority deprived him of the right to the unimpaired assistance of counsel as assured under Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942).

III

STATEMENT OF QUESTIONS INVOLVED

Was it prosecutorial misconduct sufficient to require reversal of an adjudication of guilt for the United States to call under subpoena a witness for the prosecution when said witness was claimed by the prosecution to have acted in concert with two defendants charged jointly with the statutory violation referred to above, where the evidence theretofore admitted showed an intimate relationship between Petitioner and said witness, said witness had been charged under complaint and warrant nolle prossed immediately before trial but where prosecution could still be reinstituted, and where said witness was represented by the same counsel as Petitioner, all without reason to believe that she would testify and with reason to believe that she would invoke the privilege against self-incrimination in the presence

of the jury, and where in fact such witness did refuse to testify upon instructions of her counsel, said counsel also representing Petitioner, so that said witness testified as to no matters material to said cause?

The United States Court of Appeals said "No".

Petitioner and Appellant says "Yes".

Said cause as presented to the Court of Appeals included also the issue of whether Petitioner and Appellant was entitled to a court trial without a jury upon demand, where the United States Attorney refused to consent to such trial. The second issue is not pursued in connection with this petition.

IV

That the constitutional provisions and statutes which this case involves are as follows:

United States Constitution, Article V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18, United States Code, §459:

"...Whoever utters or publishes as true any such false, forged, altered or counterfeited writing with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited...' shall be guilty of an offense against the laws of the United States.".

Title 18, United States Code, §2:

"...Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal or whoever causes an act to be done which if directly performed by him or another would be an offense against the United States punishable as a principal."

V

CONCISE STATEMENT OF CASE

Petitioner and Appellant herein was charged with the offense of uttering and publishing a counterfeit writing with intent to defraud the United States, with knowledge of the fact that the same was in fact forged. This act is claimed to have taken place on March 11, 1968. Briefly, the facts claimed to be shown by the evidence submitted are as follows. That on December 12, 1967, a Social Security check was issued payable to one Fern E. Bonner for $4,091.70. This was never delivered to the payee, but was instead stolen from the mails by the manager of the apartment house at which she had formerly resided. This thief then delivered the check to a man that he knew as William Ellington, without any endorsement thereon, on representation by Ellington that he knew a white man named "Mike" who could cash the check. Ellington denies the occurrence of such action (Transcript, p. 202). The check thereafter appeared in the possession of one Michael Sassin, and was by him delivered to

Petitioner and Appellant, at which time it bore an endorsement purported to be the endorsement of the payee. This check was then endorsed by Petitioner and Appellant for deposit and deposited in his bank account on March 11, 1968. On March 21, 1968, Petitioner, after being informed by the bank that the check had cleared and was apparently good, issued a check for $2,000.00 to Michael Sassin and a check for $1,091.70 to one Maxine Green, said checks showing under the endorsements "client's share of recovery of "$4,091.70".

It is not disputed that the check was in fact signed by one other than the payee, and the point of factual issue as related to Petitioner at trial was whether he in fact knew that the check both had not been endorsed by the payee, and had not been endorsed by any other person upon her instructions and delivered pursuant to her instructions.

The testimony introduced at the time of trial showed continuing associations between Petitioner, the said Michael Sassin, and Maxine

Green, although it is silent as to the dates of such associations, except that all three had been frequently seen together in one particular bar in the neighborhood where Petitioner resided. At the time of arrest of Petitioner, he was occupying an apartment in which Maxine Green also was present. This was on December 5, 1969.

Defendant Sassin and Petitioner were charged under Grand Jury indictment, and thereafter the said Maxine Green was charged under complaint and warrant with complicity in the same offense, this being apparently based upon the issuance of the check by Petitioner to the said Maxine Green. Eight days before trial, the warrant was dismissed by the prosecutor on the grounds that "because of lack of criminal intent, the United States Attorney is of the opinion that the interests of justice do not warrant further prosecution as to the Defendant" (Transcript, p. 338).

Appearance was made on behalf of Maxine Green in the prosecution instituted against her by the firm of Finch & Finch, which firm was

originally counsel of record for both defendant Sassin and Petitioner, substitution therefor being made by one Robert S. Cohen as attorney for defendant Sassin prior to trial. This firm is comprised of William P. Finch and Sharon Finch, and both members were present in court throughout the trial as representing Petitioner.

Throughout trial, repeated references were made to Maxine Green as being an equal principal in the claimed fraudulent scheme with the two defendants on trial, her name with specific reference to associations with Petitioner appearing on many pages of the transcript, and questions being asked of no less than nine of sixteen witnesses as to the degree of association between her and Petitioner. The testimony of at least two witnesses was limited entirely to proof of association between the two defendants, in each instance including Petitioner, and Maxine Green. The United States Attorney claimed in both opening statement (Transcript, p. 64) and closing statement (Transcript, pp. 328-330; 351-352) that she was deeply involved in this crime, and stated

at page 189:

> "I considered it to be a material fact that she knew both defendants for a long period of time."

Immediately before trial and after the nolle pros, she was subpoenaed as a witness for the prosecution. The record does not disclose any basis for the United States Attorney having reason to believe that she would testify. Upon trial, the prosecutor called as his last witness Maxine Green.

Her testimony and colloquy between court and counsel is set forth in full as follows:

> "MAXINE GREEN,
> being first duly sworn, was examined and testified on her oath as follows:
>
> DIRECT EXAMINATION
>
> BY MR. HAUSNER:
>
> Q. Would you please give your full name to the jury?
> A. Maxine Green.
> Q. Is it Miss or Mrs.?
> A. Miss.
> Q. Miss Maxine Green. Miss Green, do you know James C. Worth?
> A. I have been advised by counsel that I should refuse to answer on the grounds that it may incriminate me.
>
> SHARON FINCH: May it please the Court, my name is Sharon Finch. I am the attorney for Maxine Green. I have advised her

that any answers she may give to any questions in this matter may incriminate her. The basis for this on my part is that she was indicted as a defendant in a companion case to this. This case was dismissed just a few days ago, on July 7, with no notice to us as counsel until after the dismissal and she was subpoenaed as a witness in this matter. There is obviously no guarantee that she could not be reindicted and recharged in a case with this and I have advised her not to make any answers.

MR. HAUSNER: Your Honor, she was never indicted. Just for the record, there was a complaint at one time against her; but she was never indicted.

SHARON FINCH: There was a warrant for her arrest. She was arraigned as to the federal procedure.

THE COURT: Whether she was indicted or not is really not material. In fact, if she was not indicted and there is only a complaint, there would be a greater possibility of an indictment than there would be if the indictment had been dismissed.

MR. HAUSNER: Just to save time, this applies to any and all questions?

SHARON FINCH: Yes.

MR. HAUSNER: The United States will have no further questions of this witness.

MR. FINCH: No questions.

MR. COHEN: No questions.

THE COURT: Very well.

You are excused, Miss Green.

(Witness excused)"

Immediately upon the excuse of this witness from the stand, the United States rested its case.

The testimony of Petitioner, which was not contradicted other than by the implications which might have been drawn by the jury from the refusal of Maxine Green to testify, was that he was acquainted with Maxine Green and with defendant Sassin, that Maxine Green told him that Sassin had a large check which had been delivered to him in settlement of a debt, and asked him if he thought he could negotiate the check, that at her request he agreed to talk with Sassin, that Sassin told him that the check had been delivered to him apparently endorsed by the payee by the common-law husband of the payee in settlement of a debt, and that if Petitioner could negotiate the same that he should retain $1,000.00 as a fee, should pay over to Sassin $2,000.00 and should pay to Maxine Green $1,091.70. Further, that Petitioner advised Sassin that the title to the check would depend upon the authority of the husband to deliver it, and that if the

payee and her so-called spouse had a later falling out, the payee might well dispute the fact of delivery, and that the $1,000.00 fee would be for representing Sassin in the event of such contingency.

Counsel for Petitioner expressly acknowledged in final argument that he was subject to a conflict in interest in taking the action required to preserve the Fifth Amendment rights of his client Green, and that he did so without regard to the interests of his client Worth (Transcript, pp. 338-339).

A verdict of guilty was returned and judgment of conviction entered. Upon appeal, that judgment was affirmed.

VI

ARGUMENT

The argument of petitioner is two-fold. First, that the prosecuting authority owed an affirmative duty to the Petitioner to see that he was fairly tried without the prejudicial effect of the Fifth Amendment claim of witness Green when he knew, or should have known, that no direct

evidence could be obtained by calling her as a prosecution witness, and that such duty was breached. Second, that such action, when taken so as to induce Petitioner's own counsel to instruct her to claim the self-incrimination privilege in the presence of the jury, on the then state of the record, denied him the assistance of counsel by requiring the simultaneous representation of conflicting interests.

A. Calling of an alleged accomplice to the witness stand with probable cause to believe that no evidence would thereby be produced, and where in fact the only result is to compel an immediate claim of the Fifth Amendment, is prosecutorial misconduct requiring reversal.

The evidence produced by the prosecutor prior to calling witness Green clearly showed that his theory was that defendant Sassin was aware of the fact that the check was unlawfully obtained, that he relayed this information to witness Green, that witness Green and defendant Sassin thereafter relayed this information to Petitioner, and that the three worked out a method

of converting the stolen check to cash and then divided up the "spoils". A great portion of the testimony was directed to establishing the fact that a close and possibly amoral relationship existed between this witness and Petitioner. Without going into great detail from the Transcript, the Court is respectfully referred to pages 64, 104, 106, 110, 152, 165-166, 173, 176, 178, 189, 190-192, 197-198, 235, 248, 257, 260, 269, 328-330, and 351-352. The witness gave only her name, and then refused to answer all subsequent questions on the grounds that such testimony might tend to incriminate her. The United States Attorney offered no reason to believe that she would testify if called, or that the privilege was no longer available to her.

Petitioner submits that the calling of this witness was for no other purpose than to compel her to claim the privilege in the presence of the jury after tying her to Petitioner in such fashion that the jury would be led to believe that her guilt was equally shared with Petitioner. The effect on the jury was the same as if Petitioner

had taken the stand, testified, and then had refused to answer on cross examination because of self-incrimination. It is submitted that the absence of any reason to believe that this witness would contribute any affirmative testimony to the web of evidence requires the reversal of the conviction on the grounds of prosecutorial misconduct.

There is great conflict in the federal cases with reference to whether the calling of a witness who claims the Fifth Amendment constitutes grounds for reversal of the conviction, with the leading United States Supreme Court case being Namet v. United States, 373 U.S. 179, 10 L. Ed. 2d 278, 83 S. Ct. 1151 (1963). That case did affirm the conviction, with a thorough discussion of the conflicting Court of Appeals decisions. However, it did recognize the rule that the prosecutor was bound to limit the witnesses called to those where he had some justification for belief that the witness would contribute some evidence, and that it was not permissible conduct to call a witness for the sole purpose of inducing a claim of

privilege. In Namet, the court expressly based its holding on the fact that the prosecutor had demonstrated a good faith belief that the witnesses called would testify, and in fact he did elicit substantial non-privileged testimony from the witnesses so called. Both witnesses were on the stand for a substantial period of time, and both witnesses did contribute substantial evidence, unlike the instant case. To the effect that this improperly narrows the rule, see the Namet dissents of Black and Douglas, JJ.

It is further submitted that the ruling of the Court of Appeals is in conflict with United States v. Tucker, 267 F. 2d 212 (U.S.C.A. 3d, 1959), where after reversing on other grounds, the court went on at page 215:

> "Because there will be a new trial, another impropriety should be mentioned in order that it will not be repeated. This case has already been tried twice. During the first trial a witness asserted his privilege against self-incrimination when asked about transactions relevant to this prosecution. At the second trial, which led to the present appeal, this witness was again called and subjected to similar inquiry. He again pleaded privilege. There is no suggestion that the Government had any reason to believe that at the second trial the witness

would answer those questions he refused to answer at the first trial. In similar circumstances, two courts of appeals have already warned that a second interrogation which has no apparent purpose but to incite invocation of the privilege against self-incrimination, is improper and likely to constitute reversible error.' See United States v. Amadio, 7 Cir., 1954, 215 F.2d 605, 613; United States v. Five Cases, etc. 2 Cir. 1950, 179 F. 2d 519, 523.

"On a third trial of this indictment, the witness in question should not be interrogated about any matter to which the Government has reason to believe he will interpose a proper plea of self-incrimination. In our view an interrogating officer himself gravely abuses the privilege against self-incrimination when, believing a truthful answer will incriminate a witness, he nevertheless insists upon asking the incriminating question with a view toward eliciting a claim of privilege and thereby creating prejudice against the witness or some other party concerned." (Emphasis added)

It is submitted that the opening statement and closing statement of the United States Attorney clearly demonstrates the belief that a truthful answer would incriminate that witness, and that she would necessarily claim the privilege because of the possibility of reinstatement of the complaint and warrant which had been nolle prossed a week earlier.

Cf. United States v. Maloney, 262 F. 2d 535 (U.S.C.A. 2d, 1959). In this instance, the court reversed primarily on the ground of the failure to give a "corrective" instruction, but did stress the impropriety of the conduct of the prosecuting authority, and distinguished the contra cases on the grounds that in those cases the prosecutor was in a position to legitimately believe either that the privilege had been waived by prior plea or conviction, or that it would be waived upon examination.

The same rule has been followed in cases in the state courts, and it is established in many of those jurisdictions that the calling of a witness acting in concert with the defendant for the purpose of obtaining a claim of privilege requires reversal.

In DeGesauldo v. People, 364 P. 2d 374 (Colo., 1961), conviction of conspiracy was reversed on this exact ground. The prosecution had called an alleged accomplice to the stand who had not yet been tried. Upon questioning by the prosecution, the witness claimed the privilege against

self-incrimination.

The court held at page 375 that:

> "It was misconduct for the district attorney to call (the alleged co-conspirator) to the witness stand and obtain from him the claim of privilege against self-incrimination in the presence of the jury."

The court further stated at page 376:

> "...the question is whether the District Attorney can call as a witness an accomplice or co-conspirator (where the accused is charged with conspiracy) in the hope that the accomplice will have suffered a change of heart, or in the alternative so as to get before the jury the fact that he, at least considers that his testimony would be incriminating to him, the accomplice. The effect of such a device is clear. The jury is told of the whereabouts of the missing defendant and he is also told that he considers it impossible to testify without incriminating himself. Does such a scene create prejudice in the minds of the jury?"

In DeGesualdo, there is a thorough review of the case law involving the question from Texas and other states. In that decision, the court went on to say:

> "'The reasoning of the California Court (People v. Plyler, 121 Cal. 160) in that case has much less appeal than that of the Texas Court of Criminal Appeals in the case of Garland v. State, 51 Tex Cr R 643, 104 SW 898, 899. There the court brought out most clearly the point which we find disturbing, mainly, the use of claim of privilege by co-defendant as a

circumstance against the defendant on trial. The Court said:

> "'We note in the record an exception to the effect that the state placed the paramour of appellant on the stand and she claimed the privilege of being an accomplice to the crime. See Merrit v. State, 10 Tex App 402. The paramour being an accomplice, the state should not attempt to place her on the stand unless she proposed to turn state's evidence. Then it would be the duty of the court, after she should testify, to charge the law of an accomplice. But it is certainly prejudicial to appellant to place his paramour upon the stand, and wring from her a refusal to testify, and have the jury use this refusal as a circumstance of guilt against appellant. We would suggest upon another trial that this be not done.'

"The most recent case is that of Washburn v. State, 1956, 164 Tex Cr R 448, 299 SW2d 706, 708. There it was said:

> "'The trial court committed error in permitting the state to call the witness Nelson, a co-defendant, to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. Such refusal...could be used as an incriminating fact against appellant.'

...

"In holding that the conduct in question was reversible error, we take notice that in the public mind an odium surrounds the claim of constitutional privilege by a witness in refusing to testify on the ground that his testimony would tend to incriminate him. This is an aggravating

factor. A district attorney, although in a sense a partisan, is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant. This and corallary principles governing his conduct have been reiterated repeatedly in numerous of our decisions. See for example the discussion in Martin v. People, 114 Colo 120, 162 P2d 597, together with the cases there cited.

"Being of the opinion that the conduct of the district attorney was prejudicial, we are constrained to hold that such conduct in view of the court's failure to prevent it, or to caution the jury to disregard it, constitutes error."

See also, McClure v. State, 95 Tex. Cr. R. 53, 251 S.W. 1099, at 1102:

"Every man has a constitutional right to decline to give testimony which would incriminate him, and it is held that, if he declines to testify, no inference of guilt may be drawn from his refusal to answer. Owen v. State, 7 Tex. App. 334. Certainly if no inference of guilt can be indulged against the man who declines to testify, none could be drawn as to the guilt of a codefendant. Appellant should not in any way be held accountable for the refusal of McComber to give testimony. If the state's purpose in putting this witness on the stand was to compel or invite his refusal to testify, in order to use this as an incriminating fact against appellant, the state was guilty of an injustice. (Emphasis added)

This issue was briefed and argued in the Court of Appeals, and summarily dismissed. It is

acknowledged that the text of the opinion (see appendix) is so brief that it will in no likelihood be cited for authority on this question. Nevertheless, it is further submitted that it is in conflict with both the rule as established in Namet and the express holding of Tucker, and should therefore be accepted for review by this Court and ultimately reversed.

B. Trial tactics of the prosecutor placing defense counsel in a position where he was forced to choose between protecting the rights of one client and serving the interests of defendant denied him his Sixth Amendment right to assistance of counsel.

The record further discloses that the witness Green was represented by the same counsel as Petitioner, and that in discharge of their professional responsibilities as to witness Green, they either wittingly or unwittingly contributed to the impact of the claim of privilege. There could be no question but that the United States Attorney was aware of such representation, as it appeared of record in the Green prosecution, and

such conduct forced counsel to choose between effectively representing the interests of one client and doing affirmative damage to the interests of the client on trial. This was not court action, unlike the cases where the court appoints one counsel to represent multiple defendants and insists on such representation over the objection of counsel, but it was certainly state action and a further violation of the duty shared equally between the prosecutor and the court to assure the accused a fair trial without the interjection of prejudicial influences. Cf. People v. Brocato, 17 Mich. App. 277 (1969); People v. Evans, 72 Mich. 367 (1888); State v. Tolson, 248 Iowa 733, 82 N.W. 2d 105 (1957).

Under the circumstances of this case, such action defeated the right of the Petitioner to the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. See Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, where the court said at 465:

> "The 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.
>
> (at 467) "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

That this is an absolute right of counsel, see United States v. Myers, 250 F.S. 292 (U.S.D.C.-Pa., 1966); United States v. Harris, 155 F.S. 17 (U.S.D.C.-Cal., 1957); Lollar v. United States, 376 F. 2d 243 (U.S.C.A.-D.C., 1967); Commonwealth v. Russell, 406 Pa. 45, 176 A. 2d 641 (1962).

In Myers, the record does not disclose whether counsel was retained or appointed, stressing only that one counsel represented three of five co-defendants the court ordered release on habeas corpus, saying at page 294:

> "The Sixth Amendment right to effective assistance of counsel includes the right to a lawyer who is not obliged to serve conflicting interests at the same time."

So also, in Lollar, the court said at page 247:

> "Only where we can find no basis in the record for an informed speculation that Appellant's rights were prejudicially affected, can the conviction stand." (Emphasis added)

The bulk of the cases dealing with this rule, as above acknowledged, deal with instances where the court has appointed one counsel to represent more than one defendant. However, to the efect that private retention of one counsel by multiple defendants does not alter the sweep of the rule see Campbell v. United States, 352 F. 2d 359 (U.S.C.A.-D.C., 1965); Case v. North Carolina, 315 F. 2d 743 (U.S.C.A. 4th, 1963); Application of Buffalo Chief, 297 F.S. 687 (U.S.D.C., S. Dak., 1969); Holland v. Boles, 225 F.S. 863 (U.S.D.C., W. Va., 1963).

So, in Buffalo Chief, the court held that the possibility of harm by a conflict of interest of the attorney representing the two accused required invalidating the conviction, then ruling at 689:

"The fact that both codefendants personally retained the same counsel does not alone preclude them from the later claim of denial of effective assistance of counsel arising from a conflict of interest."

And in Holland, the court held at 865-866:

"The law is clear that such an attempt to serve two masters with conflicting interests renders the attorney incapable of giving to either the impartial, disinterested and effective representation that is the constitutionally protected right of each (citing Glasser). The constitutional infirmity inherent in proceedings conducted under such circumstances is not affected by the fact that the attorney with the dual and irreconcilable loyalties is privately employed rather than court appointed (citing Case, et al)."

These two were not co-defendants, but even a cursory review of the Government's opening and closing statements clearly indicates that they were equally accused, and the factual picture presented to the jury by the action of defendant's counsel could not help but be taken as an admission of the guilt of the charged defendant.

VII

RELIEF REQUESTED

That this Court shall grant this petition for a writ of certiorari to review the decision

of the Court of Appeals and make appropriate order.

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Dated: July 8, 1971.

NO. 21,017

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

F I L E D

JUN 8 1971

JAMES A. HIGGINS, CLERK

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

v. :

JAMES C. WORTH :

Defendant-Appellant :

O R D E R

- - - - - -

Before: PECK, BROOKS and KENT, Circuit Judges.

This appeal coming on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises having concluded that a trial by jury had not been effectively waived and that no error prejudicial to the rights of the defendant-appellant intervened at trial,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

s/ James A. Higgins
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-47

JAMES C. WORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. The petition for a writ of certiorari was filed on July 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case it was plain error for the prosecutor to call a witness who invoked her Fifth Amendment privilege against self-incrimination and refused to testify.

442-274—71

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendant Michael Sassin were convicted of uttering as true a government check bearing the forged endorsement of the payee, in violation of 18 U.S.C. 495 and 2. Petitioner was committed to the custody of the Attorney General for study and observation under the provisions of 18 U.S.C. 4208(b). The court of appeals affirmed *per curiam* (Pet. App. 29).

The operative facts are not in dispute. On December 12, 1967, a United States government social security check in the amount of $4,091.70 was issued to Fern E. Bonner. The check was stolen by the manager of Mrs. Bonner's apartment, who gave it to one Ellington (Tr. 134–135, 104–105). Subsequently, on March 11, 1968, petitioner deposited the check to his bank account; it bore a forged endorsement of Mrs. Bonner (Tr. 263), and petitioner's genuine endorsement. On March 21, 1968, petitioner issued two checks, one to co-defendant Sassin in the amount of $2,000, and the second to one Maxine Green for $1,091.70. On each check was typed, "Client's share of recovery of $4,091.70 debt."

When petitioner was later arrested, a woman identified afterwards as Maxine Green was in his apartment (Tr. 176). At the time of his arrest, petitioner denied that he knew anyone named Maxine Green (Tr. 178). Testimony at the trial indicated that petitioner had frequently been seen in the company of Maxine Green and Sassin, and that Maxine Green referred to petitioner as her husband (Tr. 191–192, 197–198).

Petitioner testified in his own behalf. He stated that Sassin brought him the $4,091.70 check and asked if it was good, saying that he had $2,000 coming from it and that petitioner could have twenty-five percent of the proceeds as his fee. A vice president of the bank had told him to deposit the check to his account. After the check had cleared, he gave Sassin a check for $2,000 and Miss Green a check for $1,091.70, on the understanding that she was to receive that for finding Sassin a lawyer whom he could trust. Petitioner explained that he had some doubt in his mind about this check and told Sassin and Miss Green they should hold on to the proceeds for at least six months (Tr. 270–273). However, he did not have Sassin endorse it, feeling that he should assume full responsibility as attorney (Tr. 276).

Evidence restricted to the question of petitioner's intent was admitted showing that he had cashed another United States Treasury check dated May 29, 1968, in the amount of $421.76, payable to another party. That check also bore the false endorsement of the payee (Tr. 208–210, 263–264). According to petitioner, Sassin brought him that check as well, and he cashed it for a similar fee (Tr. 277).

Miss Green was called as a government witness. When asked if she knew petitioner, she answered, "I have been advised by counsel that I should refuse to answer on the grounds that it may incriminate me." At that point, a partner of petitioner's attorney present in the court stated that she represented Miss Green and had advised her that any answers in this matter

might incriminate her. Miss Green had been arrested and arraigned for her part in cashing the check. Though the charge against her had been dismissed a few days before petitioner's trial, Miss Green's attorney expressed concern that she could be charged again. When Miss Green's attorney indicated that she had advised her not to answer all questions, the government attorney did not question her further (Tr. 268–269). Defense counsel did not question her or object. The court charged, *inter alia* (Tr. 375):

> In this case, as you will recall, one witness refused to answer on the grounds of the Fifth Amendment, on the grounds of self-incrimination; and I instruct you that a witness has the right to refuse to answer questions on the grounds of self-incrimination. It is important to remember that no inferences should be drawn as to what the answer might have been nor should the fact that a witness refuses to answer certain questions be construed against a defendant in any way since the witness, by so refusing to answer, merely stands upon her constitutional right not to subject herself by self-incrimination to a possible criminal prosecution.

ARGUMENT

Petitioner claims that he was unfairly prejudiced and denied the effective assistance of counsel by reason of the prosecutor calling Miss Green as a witness when he knew that she would refuse to testify on self-incrimination grounds. There is, however, no record support for the assertion that the prosecutor knew of Miss Green's intentions. Merely because Miss Green

was implicated with petitioner did not indicate that she would refuse to give any information concerning the transaction, particularly in light of the fact that the charges against her had been dropped. Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury. See *Welch* v. *United States*, 371 F. 2d 287, 293 (C.A. 10), certiorari denied, 385 U.S. 957.

As soon as Miss Green claimed the privilege, the interrogation ceased; there was no repetitive questioning. And the trial judge admonished the jury that Miss Green's refusal to testify was perfectly proper. In these circumstances, it is clear that government counsel was not trying to improve the government's case by inferences arising from Miss Green's claim of the testimonial privilege; her refusal to answer did not add critical weight to the case against him; and there was no plain error by reason of this occurrence. *Namet* v. *United States*, 373 U.S. 179; *United States* v. *McKuin*, 434 F. 2d 391, 397–398 (C.A. 8), certiorari denied, 401 U.S. 911; *United States* v. *Roselli*, 432 F. 2d 879, 902 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Brickey*, 426 F. 2d 680, 688 (C.A. 8), certiorari denied, 400 U.S. 828; *Birns* v. *Perini*, 426 F. 2d 1288, 1292–1293 (C.A. 6), certiorari denied, May 3, 1971 (No. 630, O.T. 1970).

Petitioner was not denied the effective assistance of his retained counsel by reason of the prosecutor calling Miss Green, as he asserts (Pet. 23–27). Miss Green was not represented by petitioner's lawyer, but by

another member of that lawyer's firm, who, while present during the trial, remained silent except for the colloquy concerning Miss Green. The prosecutor could have done nothing to alter petitioner's or Miss Green's choice of attorney or to avoid what petitioner characterizes as a conflict of interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

AUGUST 1971.

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UNITED STATES OF AMERICA

REPLY BRIEF

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No. 71-47

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REPLY BRIEF

Now comes JAMES C. WORTH, Petitioner, by counsel named below, and submits the following as a reply brief in response to the brief of the United States in opposition to his original petition, the text thereof being limited to the matters argued by the Solicitor General with relation to the claimed lack of knowledge of the United States Attorney of the claim of privilege, and the further claim that the United States Attorney had no alternative to compelling the claim of privilege by counsel representing Petitioner.

ARGUMENT

The brief for the United States in opposition does not materially challenge either the concise statement of the case as made by Petitioner, nor the major legal issues propounded on pages 14 and 23. It is instead limited first to a contention that the record does not support the assertion that the prosecution knew of the intention of the witness (Brief in Opposition, p. 4), and second the assertion (without benefit of authority or discussion of the argument of Petitioner) that he was not denied the effective assistance of counsel.

In the first instance, Petitioner concedes that the present state of the record does not support an affirmative statement of the extent of the actual proven knowledge of the United States Attorney supported by direct evidence, as opposed to what may be reasonably inferred from the events of arrest, charge, dismissal and case theory developed by his opening and closing statements and the evidence introduced by him. On the other hand, neither by direct evidence or inference is there any support whatever for the contention of the

Government, set forth on page 5 of its brief, that:

> "...Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury..."

If this is conceded to be the controlling fact issue, Petitioner respectfully submits that this Court should consent to an expansion of the record to make a factual determination of the extent of prior knowledge of the prosecuting authority. This record was not made in the trial court, apparently due to the failure of then trial counsel to recognize the magnitude of error committed by the prosecutor or even the conflict of interests impossible of reconciliation until closing argument. Such tactical error may, if trials are to be conducted solely under the rules of gamesmanship, be charged to Petitioner. If trials are to be conducted seeking justice and in accord with due process of law, it should not.

As stated, the record of direct evidence is silent. Following this argument as an appendix

are duplicates of affidavits now in the possession of the undersigned counsel showing the actual knowledge of the Government trial counsel taking the case without the ambit of the authorities cited by the Solicitor General. These affidavits clearly establish that the Government was aware of the fact that this witness would not testify and certainly there could have been no question in the mind of trial counsel that the privilege would be sustained if claimed where the warrant under which she was charged had been dismissed only eight days prior, and where the evidence theretofore introduced was at least partially aimed towards establishing the guilt of the witness called.

Should the Solicitor General choose to dispute this further at this time, counsel submits that the appropriate remedy would be to remand the cause to the District Court for a hearing limited to the sole issue of the knowledge of trial counsel before determination of this application.

As to the cases cited by the Government in opposition to the argument of Petitioner, all can be distinguished on the facts, and in fact some

lend support to the contentions of Petitioner.

In Welch v. United States, 371 F. 2d 287, cited with reference to the failure of counsel to request screening outside the presence of the jury, the issue was not the compulsion of a privilege claim in the presence of the jury, but rather related to excessive trial publicity and an unproven fear that the jury may have learned that the privilege had been claimed by two witnesses closely associated with the defendant. The appellate court expressly held (at 293) that it knew "of no rule...requiring the acceptance of a claim to personal constitutional privilege before it is asserted and screened outside the jury's hearing." (emphasis added)

In Namet v. United States, 373 U.S. 179, also cited by Petitioner, the witnesses in fact did testify, and the affirming majority pointed out at page 188 that even though the privilege was invoked and sustained as to some questions, "there remained an independent and quite proper reason to call the Kahns as witnesses." This is clearly not the instance in the present case. As further

distinction, it is obvious from Namet that the there prosecutor had legitimate grounds for belief that the privilege could not be invoked by the witnesses called.

In United States v. McKuin, 434 F. 2d 391, the appellate court stressed that the basis of the trial court's ruling was the affirmative representation by the United States Attorney that he did not know the witness was going to "take the Fifth...that it came as a complete surprise to him." (p. 398) The witness there claiming the privilege had also formerly given a statement to the postal inspector (see pp. 397-398) which would support the conclusion that the prosecutor was justifiably surprised.

In United States v. Roselli, 432 F. 2d 879, next cited by the Government, the reviewing court stated that the incidents there complained of occupied only "a few moments in a six-month trial" (p. 903), found the prosecution's motives proper, but still added at 902-3:

> "We do not approve the practice of questioning a witness after he has indicated that he will decline to testify."

In Birns v. Pirini, the defendant took the the stand himself and then refused to answer two questions on cross examination. The court distinguished Maloney and Compton on the basis of express findings that there was no conscious effort by the State to build its case out of inferences arising out of the claim of privilege, and that there was no deliberate attempt by the State to cause appellant to invoke the privilege (see pages 1292-1293).

Under the cases cited by Petitioner in the original application, it is submitted that the same modifications as stated in the above decisions are clearly a part of the rule, but do not apply to the instant case.

Granted a pretrial motion to quash the subpoena served on witness Green should have been made; granted an immediate motion for mistrial should have been made; granted either such motion should have been granted. They were not made; they were not granted. The issues remain, and in all decency should now be faced rather than passed by on the theory that incompetence of trial counsel is forever

tarred to the accused. Cf. Buffalo Chief, cited in the initial brief of Petitioner and ignored by Respondent.

Petitioner further relies on the conflict of interests question raised in the second section of the application, unanswered by the Government except as follows:

> "Petitioner was not denied the effective assistance of his retained counsel by reason of the prosecutor calling Miss Green, as he asserts (Pet. 23-27). Miss Green was not represented by petitioner's lawyer, but by another member of that lawyer's firm, who, while present during the trial, remained silent except for the colloquy concerning Miss Green..." (pp. 5-6)

No authorities are cited; no argument is made. It is submitted that this thesis is singularly inconsistent with the preceding argument that:

> "...Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury..."

Professional responsibility extends throughout a partnership or firm, applying equally to partner and associate. This is hornbook law, and it is certainly elementary that one partner cannot

properly act as counsel advising a client whose interests may be in opposition to a party represented by another partner in the same firm.

As to the contention that the prosecutor had no remedy, he could have readily avoided the issue by declining to request issuance of the subpoena, excusing the witness as requested out of the presence of the jury, calling her as a witness without examining her and tendering her to the defense for cross examination, or by motion to strike the appearance in either cause. See argument, supra.

RELIEF REQUESTED: That this Court shall grant relief as originally prayed, or in the alternative remand for an evidentiary hearing as to the extent of knowledge of trial counsel, retaining jurisdiction.

CHARLES A. ROBISON
Attorney for Petitioner
911 North Eaton Street
Albion, Michigan 49224

ALLEN, WORTH, HATCH & CALDERONE

By _____
Of Counsel
1009 Security Bank Building
Battle Creek, Michigan 49014

Dated: September 10, 1971.

APPENDIX

A F F I D A V I T

STATE OF MICHIGAN)
) ss.
County of Wayne)

WILLIAM P. FINCH, being first duly sworn, deposes and says as follows:

1. That he is a partner in the firm of Finch & Finch, which said firm entered its appearance in the case of United States of America v. James C. Worth, now pending on application for certiorari in the United States Supreme Court as docket number 71-47.

2. That said firm had also entered its appearance as counsel for the defendant in a companion case, the same being United States of America v. Maxine Green, the claim of the Government being that both defendants had aided and abetted the passing of a United States Government check bearing a forged endorsement, the last mentioned cause being disposed of by motion for voluntary dismissal made by the United States Attorney shortly before trial of the first mentioned cause.

3. That division of representation of the two defendants between the firm was made by making it the primary responsibility of deponent to defend James C. Worth, while primary responsibility for defense of Maxine Green was that of Sharon Finch, the other partner in the firm.

4. That immediately prior to the commencement of the trial of James C. Worth, deponent advised John Hausner, then acting as trial counsel for the Government, that the said Maxine Green would not testify if called as a witness other than to identify herself and to claim the Fifth Amendment privilege as a justification for the refusal to testify, and requested Mr. Hausner to release her from subpoena to avoid the loss of her job, since there would be no testimony given which would have a bearing on the facts of the cause, which said request was then and there refused.

5. That deponent is informed and believes that the said Sharon Finch caused to be typed out and given to witness Green the proper language to be used in claiming the Fifth Amendment privilege, and knows of his own knowledge that she was instructed to claim that in response to any and all questions other than her identity; that the said Sharon Finch remained at the counsel table throughout ~~trial~~ for the sole purpose of assisting in the effective claim of Fifth Amendment privilege of witness Green, and that deponent is informed and believes that the said John Hausner was aware of the fact that this was her sole reason for remaining through trial.

FURTHER DEPONENT SAYETH NOT.

s/ William P. Finch
William P. Finch

Subscribed and sworn to before me
this 10th day of September, 1971.

s/ Linda M. Besteni
Notary Public, Wayne County, Mich.
My commission expires: 8/14/73

A F F I D A V I T

STATE OF MICHIGAN)
) ss.
County of Wayne)

MAXINE GREEN, being first duly sworn, deposes and says as follows:

1. That she was subpoenaed as a witness in the cause of United States of America v. James C. Worth in the Federal District Court in Detroit, Michigan on the 14th day of July, 1970.

2. That deponent appeared at the Federal Building in said City pursuant to said subpoena and was present in the hall outside the Courtroom immediately prior to the commencement of trial, at which time there was present in the group John Hausner, Assistant United States Attorney, William P. Finch, and Sharon Finch.

3. That at such time and place, the said William P. Finch advised Mr. Hausner that they had instructed her to claim the Fifth Amendment privilege against any obligation to testify other than to identify herself, that she would not testify, and that "he might as well let her go so that she wouldn't lose her job"; that Mr. Hausner then advised Mr. Finch that he would not release deponent from the subpoena and that she would have to be present in Court throughout the trial.

4. That deponent was instructed prior to trial that she should claim such privilege, and was further given a slip of paper with words to use for the claiming of such privilege that had been prepared by Sharon Finch, who was acting as attorney for deponent.

FURTHER DEPONENT SAYETH NOT.

s/ Maxine Green
Maxine Green

Subscribed and sworn to before me
this 13th day of September, 1971.

s/ Margie Himmelreich
Notary Public, Wayne Co., Mich.
My commission expires: 8/5/75

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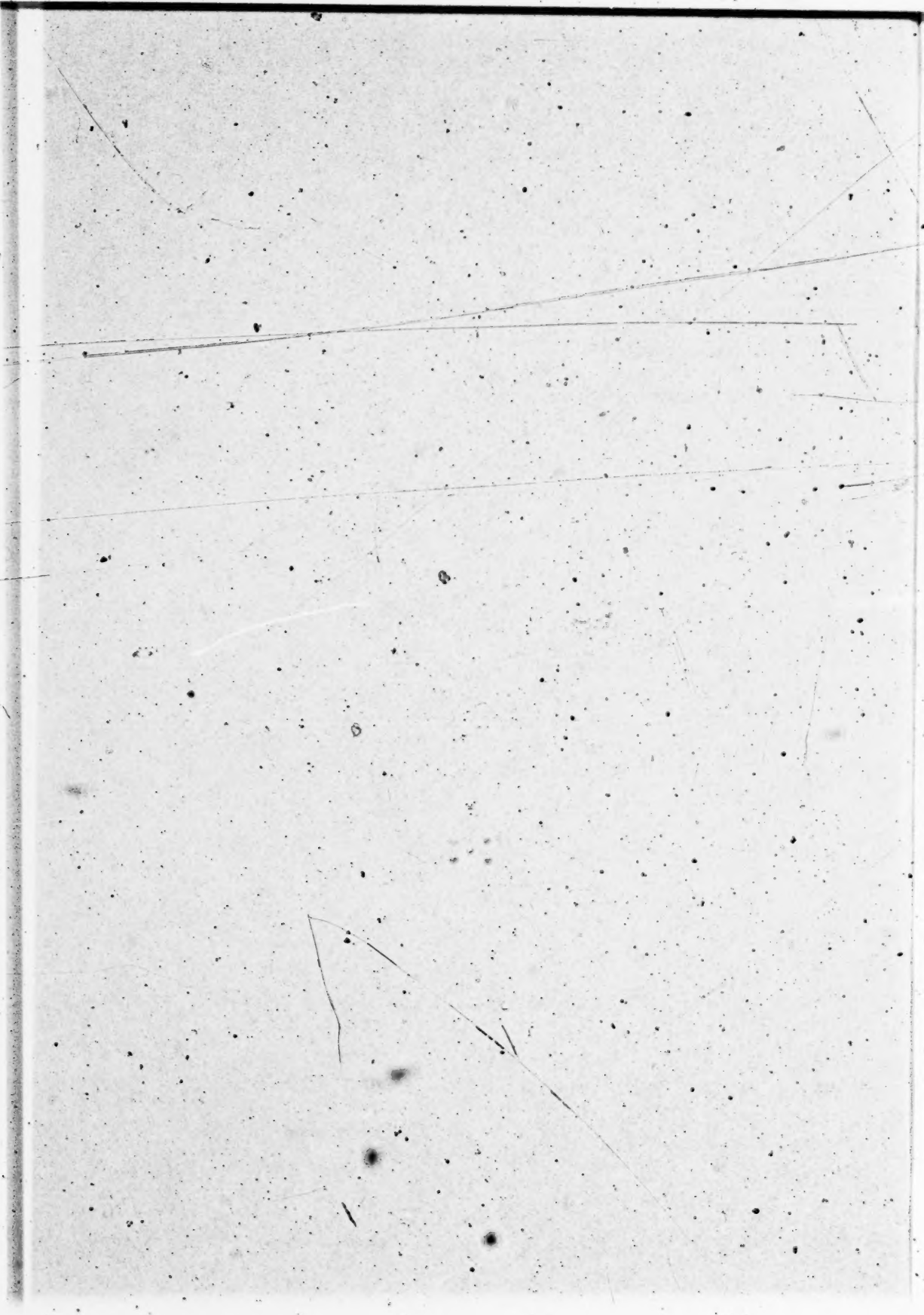

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APPLICATION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes JAMES C. WORTH, Petitioner, by counsel named below, and respectfully submits the following as his application for rehearing on his petition for writ of certiorari heretofore filed, which said petition was denied by order of this Court on October 12, 1971.

ARGUMENT

This application is primarily submitted because of the arguments made by Respondent to the effect that the writ should not be granted without a showing that the prosecuting authority had affirmative knowledge of the intention of

witness Green to claim the Fifth Amendment privilege as to all questions other than her identify.

The Reply Brief heretofore filed by Petitioner was submitted to this Court on or about September 16, 1971, some 30 days subsequent to distribution of the original petition and the brief of the United States in opposition to the members of this Court, and counsel is not aware as to whether the cases cited and arguments made therein were considered in arriving at the conclusion that the petition should be denied. It is on the assumption that these arguments were not considered, and especially that the affidavits appended proving such affirmative knowledge were not reviewed, that this application and certificate are made.

It is the position of Petitioner that circumstances did in this cause intervene of substantial effect, in that subsequent to the filing of the original petition, and long subsequent to the filing of the brief with the United States Court of Appeals, present counsel first became aware of the fact that the United States

Attorney trying the cause had been expressly advised that witness Green would not in fact testify, so that it could be proven affirmatively rather than by inference that the sole purpose of calling this witness was to induce a claim of the Fifth Amendment privilege in the presence of the jury. The entire discussion of this facet of the case by the Solicitor General was keyed to the theory that there was no way in which the United States Attorney could have learned that she would not testify other than calling her to the witness stand, and the affirmative statement of fact made, unsupported by the record, that no notice was given Government counsel that she would refuse to testify. Cf. Brief in Opposition, p. 5; United States v McKuin, 434 F. 2d 391.

In the instant case, it is submitted that there are substantial issues presented which involve the Sixth Amendment rights of representation by counsel, and the due process right to be tried fairly with the prosecuting authority limiting the evidence offered to that designed to

ultimately find the truth rather than to prejudice the jury by requiring the privilege claim in such circumstances as to create the inference that if the witness was guilty, the defendant must necessarily be guilty also. Cf. affidavits submitted as an appendix to the Reply Brief, pp. 10-12; United States v Tucker, 267 F. 2d 212 (U.S.C.A. 3d, 1959); Namet v United States, 373 U.S. 179, 10 L. Ed. 2d 278, 83 S. Ct. 1151 (1963).

WHEREFORE, Petitioner prays that a rehearing be granted on his petition for writ of certiorari, and that upon such rehearing, said writ be issued, and further that the mandate of this Court be stayed pending determination on this application.

Respectfully submitted,

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ALLEN, WORTH, HATCH & CALDERONE

By _____
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Dated: November 4, 1971.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the foregoing application for rehearing is presented in good faith and not for delay, and that this application is restricted to the intervening circumstances felt to be of controlling effect, the same being the proof of the actual knowledge of the prosecuting authority of the intent of the witness called.

Charles A. Robison

CHARLES A. ROBISON